No. 79-380

In the Supreme Court of the United States

OCTOBER TERM, 1979

GERALD RANDALL WHITAKER AND EDWARD JOSEPH FITZPATRICK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioners contend that the admission of marijuana at their trial violated their rights under the Fourth Amendment.

Following a jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of unlawful importation of 9,098 pounds of marijuana, in violation of 21 U.S.C. 952(a) and 960(a)(1), and possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner Whitaker was sentenced to concurrent terms of four years' imprisonment and a special parole term of two years. Petitioner Fitzpatrick was sentenced to concurrent

terms of three years' imprisonment and a special parole term of two years. The court of appeals affirmed (Pet. App. 1a-11a).

1. On December 24, 1976, while on marine patrol, United States Customs Service officers spotted a 42-foot boat two or three miles offshore approaching Miami, Florida. As the boat entered Biscayne Channel, it was observed to be pushing a lot of water, riding low in the water and throwing a big bow wake, all indicating to the officers that the boat was heavily laden. No name or home port was displayed on the stern or elsewhere. A card bearing Florida registration numbers was visible in one window. The practice of using temporary numbers is usually reserved to new boat dealers, and this vessel appeared within the experience of the officers to be approximately 15 years old. The windows were closed and the curtains drawn.

Their suspicions aroused, the officers radioed for a computer check on possible offenders connected with the Florida registration numbers. As they awaited a response, the customs officers continued to follow the boat, and saw that it appeared to be handling sluggishly with little or no waterline visible, further indications of a heavy load. The computer check revealed four possible "hits" under the name of William Lawson, whereupon the officers decided to board the vessel.

The officers pulled alongside the boat, announced themselves, and sought permission to board for an identification check. Once alongside the boat one of the officers smelled a strong odor and a second officer thought he smelled marijuana. When the officers boarded and requested the boat's registration, petitioner Whitaker merely shrugged. Another officer picked up marijuana residue observed on the deck. Upon opening the cabin door, the officers saw a large quantity of marijuana.

2. The majority below sustained the search and seizure in this case on the following line of reasoning. Since the boat "was first sighted out in customs waters,"[1] Customs officers could have stopped it then, pursuant to 19 U.S.C. 1581(a),[2] "even absent the indicia that reasonably aroused their suspicions" because, "at least as to vessels initially sighted within customs waters, the fourth amendment does not prohibit document stops in the absence of suspicion, reasonable suspicion, or probable cause" (Pet. App. 5a). See *United States* v. *Freeman*, 579 F.2d 942 (5th Cir. 1978). It followed therefore that the actual stop after the computer check and after the boat was within inland waters constituted an act of "discretion [exercised] in a more restrained fashion" (Pet. App. 5a), and within the reasonableness standard of the Fourth Amendment.

In our view, this analysis is sound, but the validity of the present search does not depend on that analysis alone. Before boarding the boat, the officers saw that it was riding low in the water, throwing an inordinate wake, and handling sluggishly, that it bore neither a name nor home port, and that its registration numbers were displayed in an unusual way. As the court of appeals stated, these facts "reasonably aroused [the customs officers'] suspicions" (Pet. App. 5a), and they came alongside petitioners' vessel and stopped it. This Court has held that a reasonable founded suspicion of illegal activity justifies a limited investigatory stop, and that a full search may be undertaken if the stop reveals facts amounting to probable cause. *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 882, 884 (1975).

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[1] "Customs waters" are those waters up to 12 miles offshore. See 19 U.S.C. 1401(j).

[2] 19 U.S.C. 1581(a) (see Pet. 2-3) authorizes customs officers to make documentary checks of foreign and domestic vessels within the United States or its customs waters. It does not require probable cause or articulable suspicion.

Once alongside petitioners' boat, the officers detected a strong order of marijuana (Pet. App. 2a-3a). At this point, as Judge Rubin's concurring opinion points out, the customs officers had an independently sufficient legal basis to board the ship (Pet. App. 11a):

> * * *the boarding of defendant's yacht was justified by probable cause coupled with exigent circumstances once the customs officers pulled alongside and smelled marijuana. The same facts, added to the marijuana residue found in plain view, validated the subsequent search.

The cases relied upon by petitioners do not assist them. In *United States* v. *Stanley*, 545 F. 2d 661 (9th Cir. 1976), cert. denied, 436 U.S. 917 (1978), although the Ninth Circuit declined to uphold the search of a vessel on the basis of 19 U.S.C. 1581(a) absent any articulable suspicion of a customs violation, it upheld the search as a border search where the vessel was seen departing the United States nine miles offshore. Here, although the court of appeals did not decide whether the search was valid as a border search (Pet. App. 3a), the boat was sighted approximately three miles offshore, approaching the United States, thus supporting, in our view, a reasonable conclusion of a border crossing. In any event, as noted, the officers approached the vessel upon reasonable suspicion and boarded it upon probable cause, both of which were absent in *Stanley*. The officers' conduct here comports with the standards announced in *United States* v. *Brignoni-Ponce*, *supra*, regardless of whether it may also have qualified as a border search (and, as noted, regardless of whether the court of appeals' majority was correct in upholding it solely on the basis of 19 U.S.C. 1581(a)).

Nor does the decision here conflict with the Ninth Circuit's holding in *United States* v. *Tilton*, 534 F. 2d 1363 (1976). *Tilton* was remanded for a determination whether customs officers could reasonably have believed that the boat had crossed the border.

Indeed, ruling on facts very similar to those of the instant case, the Ninth Circuit, after *Tilton*, ruled in *United States* v. *Odneal*, 565 F. 2d 598, 601 cert. denied, 435 U.S. 952 (1977), that, despite lack of evidence of any border crossing, a customs officer who noted that a yacht appeared to be riding low in the water, displaying no name nor home port, and carrying temporary dealer's numbers, had a "founded suspicion that the vessel might be carrying contraband" (565 F. 2d at 601) sufficient to subject it to a "brief investigatory stop" (*ibid.*) and that, once alongside, a strong odor of marijuana supplied probable cause for a boarding and search.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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